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No. 02-1192

Supreme Court, U.S.
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In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,
PETITIONER,
v.
AVIALL SERVICES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF CONOCOPHILLIPS CO., E. I. DU PONT DE NEMOURS AND COMPANY, INC., FORD MOTOR CO., GENERAL DYNAMICS CORP., GENERAL MOTORS CORP., AND MONTROSE CHEMICAL CORP. OF CALIFORNIA IN SUPPORT OF RESPONDENT AVIALL SERVICES, INC.

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QUESTION PRESENTED

Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107, 42 U.S.C. §§ 9606 or 9607, may nonetheless bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs it has incurred voluntarily or under government compulsion to clean up properties contaminated by hazardous substances.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae ConocoPhillips Co. ("ConocoPhillips"), E. I. du Pont de Nemours and Company, Inc. ("DuPont"), Ford Motor Co. ("Ford"), General Dynamics Corp. ("General Dynamics"), General Motors Corp. ("General Motors"), and Montrose Chemical Corp. of California ("Montrose") (collectively, the "Companies"), by the nature of their industries, are involved on an on-going basis with issues related to the cleanup of hazardous substances at sites throughout the United States.[1] ConocoPhillips is one of the nation's largest integrated petrochemical companies; DuPont is among the largest chemical products manufacturers; Ford and General Motors are two of the world's leading automobile producers; General Dynamics is a leader in aerospace and defense technologies; Montrose was the world's largest producer of the pesticide DDT. The Companies include some of the largest corporate entities in the world, and contribute significantly to the national and global economy, with annual revenues of over $445 billion and a combined workforce of over 885,000 people.

The Companies have been and continue to be involved in hundreds of environmental cleanups at their facilities and other sites, including sites for which they have been identified as potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et. seq.* As a result, they have vast experience dealing with the remediation of hazardous substances and the recovery of remediation costs, under CERCLA and other related statutes.

The Companies have engaged in more than 170 cleanups

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[1] No party or its counsel authored this brief in whole or in part. Other than the *amici curiae*, no other person or entity made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have given consent to file this brief, and copies of their consent letters have been submitted concurrently.

without the compulsion of a civil lawsuit under CERCLA. They have done so voluntarily, pursuant to United States Environmental Protection Agency ("EPA") orders, as required conditions of operational permits under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and as required by state regulatory authorities. The Companies have performed many such cleanups even though other parties were partially or wholly responsible for the contamination, and therefore liable for some or all of the cost of cleanup. They have been willing to do that because for two decades settled law has ensured that other PRPs eventually would pay their fair share through the CERCLA contribution mechanism.

The ability to obtain equitable contribution from other responsible parties is what has for decades enabled the Companies and others nationwide to undertake voluntary and cooperative responses to releases of hazardous substances without first engaging in expensive, protracted, unnecessary litigation or administrative processes. Petitioner and its *amicus* the United States now seek to restrict contribution to parties forced to perform cleanups by federal lawsuits and eliminate contribution for anyone who performs cleanups voluntarily or pursuant to other forms of governmental coercion. Such a curtailment of the contribution right will create an enormous disincentive to future voluntary or agency-compelled remediation, and inequitably saddle parties only partly responsible for contamination with the full costs of cleanup, while permitting other parties responsible for the contamination (like the United States) to avoid paying their fair share.

For these reasons, the Companies have a critical interest in the outcome of this case, and their informed views should assist the Court in resolving this important issue of law.

STATEMENT OF THIS CASE

Amici curiae concur with and adopt the statement of the case proffered by Respondent.

SUMMARY OF ARGUMENT

For more than two decades, PRPs have cleaned up hazardous pollutants at facilities nationwide without the necessity of a federal lawsuit or court order, consistent with the fundamental purposes of CERCLA and secure in their ability under the statute to obtain federal common law contribution from other responsible parties. Petitioner and the United States seek a radical change in that law. In their view, the plain language of Section 113(f)(1) of CERCLA allows contribution only during or after a civil action under Section 106 or Section 107 of CERCLA. That is, of course, not what the text actually says. Nor is it a permissible reading of that text in the context of the statute as a whole. Interpreting Section 113(f)(1) to forbid contribution for any person or company that has performed a cleanup voluntarily or pursuant to another EPA or state program is flatly inconsistent with Congress's desire to ensure the prompt cleanup of hazardous substances and impose the costs on those responsible for the contamination. It is also flatly inconsistent with Congress's desire in CERCLA to treat the United States, when the United States is a PRP, the same as any other PRP. Foreclosing contribution in the absence of a civil action under Section 106 or Section 107 would allow the federal government—by picking and choosing among enforcement priorities based on whether the United States is or is not a PRP at a particular site, or forcing cleanups by other means—to avoid altogether its responsibility to remediate contamination caused by government action. Congress could not and did not intend for the law to function in that way.

A. The contribution provision in CERCLA Section 113(f)(1) does not preclude a PRP that has incurred costs to clean up contaminated property from seeking contribution in the absence of a civil action under Section 106 or Section 107. Contrary to Petitioner's and the United States's arguments, which require adding words that do not actually appear in the text, the first sentence of Section 113(f)(1) may

be read to authorize an action for contribution during or following a civil action under Section 106 or 107, without precluding contribution claims in the absence of such an action; and Section 113(f)(1)'s final sentence is most naturally read to preserve *all* other available avenues for contribution, under federal common law as well as state law.

B. This interpretation is far more consistent with the purposes of Section 113(f)(1) than is Petitioner's revisionist view of the law. Before the 1986 amendments added that provision, courts allowed CERCLA contribution claims to proceed regardless of the existence or absence of a proceeding under Section 106 or 107. Nothing in the legislative record suggests that Congress intended to foreclose that remedy. To the contrary, the legislative history makes clear Congress's expectation that the courts would continue to apply federal common law contribution broadly, as a necessary concomitant to the application of common law-based principles of joint and several liability in civil actions and administrative orders under CERCLA Sections 106 and 107.

C. Petitioner's understanding of Section 113 is also flatly inconsistent with Congress's fundamental intention through CERCLA to encourage the prompt cleanup of hazardous substances. The availability of contribution for remediation not compelled by civil litigation has fostered a willingness on the part of parties such as the Companies to spend billions of dollars to clean up contamination without resort to costly and time-consuming litigation or the formal procedures of CERCLA. Congress and EPA have consistently recognized that this voluntary or agency-ordered compliance is crucial to achieving CERCLA's goal of prompt cleanup. If this Court were to adopt Petitioner's interpretation of the law to preclude contribution in these circumstances, no company with a colorable claim for contribution against other PRPs would ever undertake a cleanup until forced to do so by court order.

It is perverse that the United States would support Petitioner's contention that CERCLA contribution should be so narrowly circumscribed, in view of the government's responsibility under the statute for promoting and enforcing hazardous waste site remediation. If Petitioner's position were adopted, incentives to undertake cleanups voluntarily or in response to agency orders would drastically decrease. Existing remediation would grind to a halt as companies demand the government bring their cleanups within the few CERCLA provisions that Petitioner argues would give rise to a right of contribution, overwhelming the government's limited resources.

Petitioner and the United States maintain that companies could nevertheless protect their rights to contribution by first settling with the federal or a state government. But that retort rings hollow, both because agencies with limited regulatory budgets will not have the resources to attend promptly to all sites requiring remediation and because state and federal governments are unlikely to agree to settlements that would trigger their own contribution liabilities on sites where they are PRPs. The result will be a massive slowdown in cleanup activity, with additional legal costs burdening remediation efforts—hardly what Congress had in mind.

D. The curtailment of contribution outside of a Section 106 or Section 107 civil action is also flatly inconsistent with Congress's goal through CERCLA to require the parties responsible for contamination to pay the costs of remediation. If Petitioner's position were adopted, those who voluntarily remediated contamination in the past would be saddled with one hundred percent of the costs, regardless of their level of responsibility for the harm, and many companies forced to remediate sites through mechanisms other than Section 106 or 107 civil actions—e.g., through Section 106 administrative orders or as conditions to a RCRA permit—would equally be deprived of any

opportunity to seek equitable contribution. It is highly doubtful that Congress intended this result either.

E. By supporting Petitioner's view of Section 113, the federal government is seeking to undermine Congress's intent—reflected in CERCLA's broad waiver of sovereign immunity—that the United States, as a PRP, be treated like any private party which caused contamination. Petitioner's position, if adopted, would permit the federal government to avoid paying its fair share of the costs of remediation by picking and choosing which sites to clean up under CERCLA (avoiding sites where it is a PRP), enforcing cleanups under other federal programs that, it now argues, do not give rise to contribution rights, or conditioning settlements on covenants by PRPs not to sue the United States for contribution (a strategy it is already pursuing). Adoption of this position would, accordingly, enable the federal government to protect its narrow fiscal interests as a PRP at hundreds of contaminated sites.

It is deeply troubling that the United States would adopt an interpretation of Section 113(f)(1) that would so fundamentally undercut Congress's purposes in enacting the sovereign immunity waiver and so dramatically retard Congress's efforts to achieve prompt remediation and equitable sharing of the costs among those responsible for contamination. This Court should reject the government's invitation to sanction that result.

ARGUMENT

I. THE TEXT OF CERCLA SECTION 113(f)(1) DOES NOT PRECLUDE A PARTY THAT HAS INCURRED RESPONSE COSTS FROM BRINGING A CONTRIBUTION ACTION UNDER CERCLA SECTION 113(f)(1) IN THE ABSENCE OF A CIVIL ACTION UNDER SECTIONS 106 OR 107

Petitioner and the United States insist that the language of CERCLA Section 113(f)(1) has a plain meaning which

permits contribution only during or after a civil action under CERCLA Sections 106 or 107. *See* Pet Br. at 5, 13-21; U.S. Br. at 10-17. But the text of Section 113(f)(1) does not lend itself to that (or any other) "plain meaning" interpretation. The Fifth Circuit was correct in finding the text inconclusive, and thus correctly interpreted that text with reference to CERCLA's underlying, remedial purposes.

Petitioner and the United States argue that, as a matter of basic English, the first sentence of Section 113(f)(1) says that contribution may be sought *only* during or following any civil action under Section 106 or under Section 107, and that its final sentence provides that the subsection shall not diminish the right of any person to bring a *state law* action for contribution. *See* Pet Br. at 6, 13-19; U.S. Br. at 10, 12-15. However, neither italicized term actually appears in the statute. Both the first and the last sentences of Section 113(f)(1) can be read intelligibly, as a matter of basic English, without the terms Petitioner inserts.

Indeed, Petitioner ultimately acknowledges that the pivotal term "may"—used in the first sentence of Section 113(f)(1) to authorize contribution during or following a Section 106 or 107 action—can be read linguistically to be either permissive (and thus allow contribution in other circumstances as well) or exclusive. *See* Pet. Br. at 14 n.8. Petitioner then argues that the canon *expressio unius est exclusio alterius* requires the exclusive connotation (Pet. Br. at 15), but that canon of construction is not as categorical as Petitioner suggests. To the contrary, it is "only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives." *United States v. Vonn*, 535 U.S. 55, 65 (2002). In CERCLA Section 113(f)(1), the contrary indication is express in the final sentence's preservation of actions for contribution in the absence of the so-called "condition precedent," and it is also evident from the purpose and context of the statute as a whole. *See Herman & MacLean v. Huddleston*, 459 U.S.

375, 387 n.23 (1983) (rejecting maxim when applying it would interfere with a statutory construction more in conformity with an act's "'dominating general purpose'") (citation omitted).

Petitioner seeks to bolster the exclusivity it reads into the first sentence by reading the final sentence to save only contribution actions under state law. But the word "state" never appears in that sentence, and if it were read to refer only to preserve state contribution law, it would be superfluous, because CERCLA's general "Savings" clause, Section 302(d), already provides that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). Moreover, had Congress desired to restrict its reference to "contribution" in the last sentence of Section 113(f)(1) to "state" contribution actions, it could easily have done so. *See, e.g.*, Oil Pollution Act, 33 U.S.C. § 2718(a) ("[n]othing in this chapter ... shall (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—(A) the discharge of oil or other pollution by oil within such State"); Health Care Quality Improvement Act, 42 U.S.C. § 11115(a) ("nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter").

Reading the final sentence of CERCLA Section 113(f)(1) to preserve both state law contribution remedies and the federal common law contribution right previously recognized and enforced by courts irrespective of the existence of a civil action under Section 106 or 107—*see* discussion *infra* at 10-12—would also comport with the

"normal rule of statutory construction ... that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

Petitioner's suggestion that the final sentence of Section 113(f)(1) should be read to preserve only *state law* contribution is not only inconsistent with the plain text and these standard canons of construction, but it is also utterly counter-historical and inconsistent with Congress's desire for a comprehensive federal solution to the problems posed by hazardous waste. When Congress adopted Section 113 in the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 ("SARA"), there were few, if any, state hazardous substance laws that provided a right of contribution. For example, the contribution provisions of the Texas statutes which Petitioner asserts were among those "saved" by the last sentence of Section 113(f)(1) were not enacted until 1989. *See* Act of Sept. 1, 1989, 71st Leg., Reg. Sess., ch. 678, § 361.344, 1989 Tex. Sess. Law Serv. 678 (codified as amended at Tex. Health & Safety Code Ann. § 361.344(a)); Act of May 31, 1989, 71st Legis., Reg. Sess., ch. 228, § 26.3513, 1989 Tex. Sess. Law Serv. 228 (codified as amended at Tex. Water Code Ann. § 26.3513). The New Jersey Spill Compensation and Control Act, which was enacted in 1976 and served as a model for CERCLA, was not amended to add a contribution provision until 1991. *See* 1991 N.J. Sess. Law Serv. 372, § 1 (West 1991) (codified as amended at N.J. Stat. Ann. 58:10-23.11f(a)(2)).

Moreover, the statutory and common laws of contribution vary so widely from state to state in their scope and procedural requirements[2] that interpreting the last sentence of Section 113(f)(1) to refer only to state

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[2] *See* discussion in Respondent's Brief regarding state contribution laws. Resp. Br. at 27.

contribution law would seriously undermine Congress's goal of providing a uniform, federal rule of law regarding the cleanup of hazardous substances. *See* 126 Cong. Rec. H11,787 (daily ed. Dec. 3, 1980) (a goal of CERCLA was to "insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in states with more lenient laws"). In light of that statutory goal, it is highly unlikely that Congress would have relied on state law contribution claims as the exclusive vehicle for bringing contribution claims absent a civil action under Section 106 and 107.[3]

II. PETITIONER'S INTERPRETATION OF CERCLA SECTION 113(f)(1) IS INCONSISTENT WITH CONGRESS'S INTENT THROUGH THAT SECTION TO CONFIRM THEN-EXISTING RIGHTS TO CONTRIBUTION AND ALLOW CONTINUED DEVELOPMENT OF THE FEDERAL COMMON LAW OF CONTRIBUTION UNDER CERCLA

Because the term "contribution" was added to CERCLA by the SARA amendments in 1986, any interpretation of that term and the section in which it appears must begin by considering how SARA was intended to affect CERCLA. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). When Congress added Section 113 in SARA, it was not legislating in a vacuum. Absent an express contribution

[3] Congress's desire for uniformity does not necessarily mean that state law contribution actions are preempted by Section 113. Pursuant to Section 302(d), where state contribution laws do not actually conflict with CERCLA, they should continue to be available. Instead, the overriding purpose of providing a uniform, federal solution to the pressing problem of hazardous waste disposal, combined with the lack of uniformity among statutory contribution provisions and case law at the state level, makes it highly unlikely that Congress was contemplating "state law contribution" when it crafted the last sentence of Section 113(f)(1).

provision, courts in the preceding five years had fashioned a federal common law contribution right among parties that were jointly liable for response costs under Section 107, regardless of whether there had been a civil action under Section 106 or Section 107. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir. 1986); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982); *see also* Pet. App. 15a-16a & n.7 (discussing pre-SARA cases permitting private right of cost recovery in the nature of contribution without prior state or federal enforcement action or settlement). When Congress enacted Section 113, it fully endorsed those efforts. *See* H.R. Rep. No. 99-253 (I), at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861; S. Rep. No. 99-11, at 44 (1985). Congress's purpose in enacting this provision, in fact, was to "clarif[y] and confirm[]" the right of contribution the federal courts had developed. H.R. Rep. No. 99-253 (I), at 59, 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2841, 2861.[4] There is no evidence to suggest that, by enacting

[4] Before the SARA amendments, courts interpreting CERCLA implied a right of contribution from the liability provisions of Section 107(a). *See, e.g., Walls v. Waste Resource Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982); *see also* Pet. App. 18a-19a. This Court has noted that, even after Congress enacted SARA, CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." *See Key Tronic*, 511 U.S. at 816; *see also id.* at 822 & n.* (Scalia, J., dissenting) (arguing that the right of action created by Section 107 is express, rather than implied). Other courts since have recognized this derivation of the federal common law right of contribution from the federal common law-based joint and several liability for response costs imputed to Section 107(a). Those courts have appreciated that, in the absence of a suit under Section 106 or 107, Sections 107 and 113 "work together—the first section creating the claim for contribution between PRPs, and the second qualifying the nature of that claim." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997); *see also* Pet. App. 22a-23a (discussing interrelationship of Sections 107 and 113); *Centerior Serv.*

Section 113(f)(1), Congress intended to cut back the contribution rights federal courts had recognized under CERCLA.

Indeed, CERCLA's legislative history demonstrates the contrary—that lawmakers desired the courts to develop the scope of CERCLA contribution consistent with evolving principles of federal common law. *See, e.g.*, 126 Cong. Rec. 30,932 (1980) ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law.") (statement of Sen. Randolph); 126 Cong. Rec. 31,965 (1980) ("[T]his bill refers to section 311 of the Clean Water Act and to traditional and evolving principles of common law in determining the liability of such joint tortfeasors. ... the bill will encourage the further development of a Federal common law in this area.") (statement of Rep. Florio). SARA was not intended to change that. Instead, the congressional reports for SARA provided expressly that even after its enactment, "[a]s with joint and several liability, contribution claims will be resolved pursuant to Federal common law." S. Rep. No. 99-11, at 45 (1985); H.R. Rep. No. 99-253(I), at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2862; *id.* (III), at 18-19,

Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 352 (6th Cir. 1998) (allowing a party to proceed with a CERCLA contribution claim after incurring costs under a Section 106 order); *Sun Co. v. Browning-Ferris Indus., Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (stating that "[u]nder CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is defined by § 107, but is governed by the equitable apportionment principles established in § 113(f)" in a claim for cost recovery by a party that had received a Section 106 order). Although a consensus has developed among the Courts of Appeals that a PRP may not bring an action directly under Section 107(a) to hold other PRPs jointly and severally liable for its response costs, *see* Pet. Br. at 35 n.29, a settled federal common law has developed, consistent with Congress's intent under SARA, which allows a PRP an implied right of contribution, derived from Section 107 and regulated by Section 113.

reprinted in 1986 U.S.C.C.A.N. 3038, 3041.[5] Consistent with that intent, ten Courts of Appeals have authorized contribution claims in the absence of a prior civil action under Section 106 or 107 since 1986. *See Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669 (3d Cir. 2003); *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 688-89 (5th Cir. 2002) (en banc); *Morrison Enters. v. McShares Inc.*, 302 F.3d 1127 (10th Cir. 2002); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043, 1046 (6th Cir. 2001); *Crofton Ventures Ltd. P'ship. v. G&H P'ship*, 258 F.3d 292, 300 (4th Cir. 2001); *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 613 (7th Cir. 1998); *Pinal Creek Group. v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 932-933, 935 (8th Cir. 1995); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1147 (1st Cir. 1989).

In no reported judicial opinion or agency pronouncement has EPA or any other agency of the United States ever before questioned the common law underpinnings of implied contribution rights under CERCLA. This is both unsurprising and appropriate, since EPA has consistently relied upon the very same traditional and evolving principles of federal common law to support its assertion that Section 107 imposes joint and several liability on PRPs. Courts recognized early on that CERCLA's general language must be interpreted in light of general common

[5] Congress's intent that evolving principles of federal common law have a place in defining contribution under CERCLA distinguish this case from *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 603 (1981), in which the Court declined to imply contribution rights under federal civil rights and antitrust statutes. The history of the statutes at issue in those cases gave no indication that Congress intended to authorize courts to create a federal common law of contribution. *See Northwest Airlines*, 451 U.S. at 94; *Tex. Indus.*, 451 U.S. at 644.

law principles. *See, e.g., United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio. 1983). Applying those principles (and at EPA's urging), the courts nearly universally concluded that that liability under CERCLA is joint and several. *See, e.g., Mardan Corp. v. C. G. C. Music Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986); *Chem-Dyne*, 572 F. Supp. at 809-10. In enacting Section 113 Congress acknowledged that the courts had counterbalanced the harshness of that joint and several liability by recognizing a "concomitant right of contribution" that sprang from the very same common law roots. H.R. Rep. No. 99-253 (I) at 79, *reprinted in* 1986 U.S.C.C.A.N. at 2861; *see also United States v. Kramer*, 757 F. Supp. 397, 436 (D.N.J. 1991) (noting that "Congress conferred the right to seek contribution from other PRPs in recognition of the impact joint and several liability could have upon PRPs selected by the Government and found liable for recovery. ... The right to seek reimbursement from other PRPs of response costs paid spreads liability more equitably among all PRPs.") (citations omitted).

Pursuant to these same common law principles, EPA routinely takes the position that a unilateral administrative order under Section 106 imposes joint and several liability on the target of the order, requiring it to clean up the entire contaminated site, even if the target is responsible for only a tiny portion of the contamination. Acceptance of Petitioner's and the United States's position in this case—that the courts should continue to enforce such joint and several liability, but without permitting the target its corresponding right to contribution—would destroy the symmetry of the common law and thereby defeat Congress's intent that the parties actually responsible for contamination bear the cost of cleanup. Given its continued reliance on federal common law-based joint and several liability under Section 106 or 107, without which contribution rights would be unnecessary, the United States

has little standing to rail, selectively, against the continued recognition of federal common law contribution.[6]

Petitioner's and the United States's insistence that the first sentence of Section 113(f)(1) proves a contrary congressional intent to eliminate preexisting federal common law contribution rights (despite the continued application of common law joint and several liability) in the absence of a civil action under Section 106 or 107, is belied by the legislative history of that provision. The bill originally proposed by the EPA and the Natural Resources Division of the Department of Justice ("DOJ") provided that contribution actions could be brought only after judgment or settlement of an action under CERCLA. *See* H.R. Res. 1342, 99th Cong., § 202, 131 Cong. Rec. H944 (daily ed. Feb. 28, 1985). The House of Representatives rejected this proposal and adopted H.R. 2817, which altered the initial proposal to make clear that a contribution action could proceed "during or following" an action under Section 106 or 107. The House Report noted that "[t]he section contemplates that if an action under section 106 or 107(a) of the Act is ***under way***, any related claims for contribution ... may be brought in such an action." H.R. Rep. No. 99-253 (I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862 (emphasis added); *see also* Resp. Br. at 22. Thus, viewed in context, the "during or following" language in the first sentence of Section 113(f)(1) was merely a surgical fix added to denote Congress's rejection of a proposal that would have required parties sued under Section 106 or Section 107 to stay their contribution claims until the proceeding was completed.

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[6] The United States's strident insistence that Congress's express provision for contribution in some circumstance precludes the continued recognition of federal common law contribution rights in others is hard to reconcile with the United States's equally adamant support for joint and several liability under Sections 106 and 107, notwithstanding the Senate's elimination of the express provision for joint and several liability from the final bill when CERCLA was initially enacted. *See* S. 1480, 96th Cong., 2d Sess., § 4(a), 126 Cong. Rec. 30,906, 30,908, 31,950, 31,955 (1980).

This clarification was included to prevent a narrowing construction of contribution rights, not to impose one.

III. PETITIONER'S INTERPRETATION OF CERCLA SECTION 113(f)(1) IS INCONSISTENT WITH CERCLA'S FUNDAMENTAL PURPOSES OF ENCOURAGING THE PROMPT CLEANUP OF HAZARDOUS WASTE AND ENSURING THE EQUITABLE ALLOCATION OF COSTS AMONG PARTIES RESPONSIBLE FOR CONTAMINATION

Congress enacted CERCLA in 1980 to provide a comprehensive federal remedy to the serious risks that industrial pollution posed to human health and the environment. The statute has two fundamental purposes: to encourage the prompt cleanup of hazardous waste disposal sites and to ensure that the parties responsible for the contamination pay the costs of remediation. *See* 126 Cong. Rec. 31,964 (1980) (statement of Rep. Florio); H.R. Rep. No. 99-253 (III), at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 3038. Petitioner's interpretation of Section 113(f)(1) would undermine both purposes.

A. PETITIONER'S CONSTRUCTION OF SECTION 113(f)(1) IS INCONSISTENT WITH CONGRESS'S DESIRE TO ENCOURAGE THE PROMPT CLEANUP OF HAZARDOUS WASTE

"'CERCLA was enacted to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites.'" *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (citation omitted). Congress recognized that the government lacked the resources to perform the necessary cleanups on its own, and therefore "sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially

responsible parties." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (plurality opinion of Brennan, J.), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *see also Key Tronic*, 511 U.S. at 819 & n. 13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others"); *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 652 (6th Cir. 2000) ("CERCLA is a statute designed to 'facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible....'" (citation omitted)). An interpretation of Section 113 that permits parties liable for contamination to seek contribution from other PRPs at the same facility, without waiting for a Section 106 or Section 107 civil action, is critical to incenting such cleanups.[7]

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[7] The Court has repeatedly taught that a remedial statute such as CERCLA must "be 'construed "not technically and restrictively, but flexibly to effectuate its remedial purposes."'" *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (citations omitted)) (Securities Exchange Act of 1934). If there is no definitive way of determining congressional intent, "'when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals.'" *California v. Am. Stores Co.*, 495 U.S. 271, 279 n.4 (1990) (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1985)) (endorsing First Circuit's interpretation of Section 16 of the Clayton Act). The Courts of Appeals have applied this principle frequently when interpreting CERCLA. *See, e.g., Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880-81 (9th Cir. 2001); *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (citing as one of CERCLA's "few well-established principles" that "'[b]ecause it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals'") (citation omitted); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 416 (4th Cir. 1999) ("Because CERCLA is 'a comprehensive remedial statutory scheme, ... courts must construe its provisions liberally to avoid frustrating the legislature's purpose.'") (citation omitted) (alteration in original); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d

Facilitating cleanups by PRPs responding to agency orders and "volunteers"—parties under threat of, but not defendants in, civil litigation—is critical to CERCLA's overall goal of promoting fast, efficient and equitable cleanups. *See Pinal Creek Group*, 118 F.3d at 1304. Despite Petitioner's failure to "discern any policy" at CERCLA's enactment favoring such "voluntarism," Pet. Br. at 36 & n.31, that policy has been crystal clear since Congress first enacted CERCLA. *See* H.R. Rep. No. 96-1016(I), at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 ("The legislation would also establish a federal cause of action ... to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites."); 126 Cong. Rec. 26,338 (1980) (remarks by Rep. Florio that CERCLA's liability scheme "creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties").

When Congress promulgated the contribution provisions in Section 113 in 1986, it was certainly aware that EPA considered voluntary cleanups essential to effective enforcement of the statute. *See* Pet. Br. at 36 n.31 (citing EPA Interim CERCLA Settlement Policy (OSWER Dir. No. 9835.0, dated Dec. 5, 1984), *published in* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985) ("The Agency recognizes, however, that Fund-financed cleanups, administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites.")). And encouraging voluntary cleanups continued thereafter to be a major focus of EPA's approach to the cleanup of hazardous waste: in post-SARA rulemaking to revise the National Contingency Plan ("NCP"), EPA acknowledged that "it is important to encourage private parties to perform voluntary cleanups of

Cir. 1992) ("CERCLA is a remedial statute which should be construed liberally to effectuate its goals.").

sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." EPA, Final Rule, National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8792 (Mar. 8, 1990).

In this regard, the statute has been a major success. Companies nationwide routinely undertake cleanups, as Aviall did in this case, without the necessity of litigation or formal enforcement action by an agency. EPA has deliberately built on this success by making it a policy to move remediation out from under CERCLA authority and into other federal and state programs. *See, e.g.*, EPA, Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities, at 2 (Sept. 24, 1996 Memorandum) ("EPA RCRA-CERCLA Coordination Memorandum"), *available at* http://www.epa.gov/Compliance/resources/policies/civil/rcra/rcracorraction-mem.pdf (last visited Apr. 4, 2004) ("[I]t has long been EPA's policy to defer facilities that may be eligible for inclusion on the National Priorities List (NPL) to the RCRA program...."). Thus, the vast majority of hazardous waste sites across the nation are now being cleaned up under non-CERCLA authority.[8] PRPs throughout the United States incur significant response costs during cleanups that do not involve Section 106 or 107 civil enforcement or a formal settlement under CERCLA. In the aggregate, these costs are staggering. The potential cost just to remediate RCRA

[8] Compared to 1,240 sites listed on the National Priorities List ("NPL") under CERCLA, there are over 6,500 facilities subject to RCRA corrective action. *See* http://www.epa.gov/superfund/sites/npl/newfin.htm (last visited Mar. 31, 2004); http://www.epa.gov/epaoswer/hazwaste/ca/training/theatre.htm, scene #77 (last visited Mar. 31, 2004). A study for fiscal year 2000 indicated that, all told, cleanups were on-going at over 15,000 non-NPL sites under state cleanup programs, and approximately 7,100 strictly voluntary non-NPL site cleanups were in progress. *See* John Pendergrass, *An Analysis of State Superfund Programs: 50-State Study, 2001 Update*, at 16-17 (2002).

facilities has been estimated to be as high as $377 billion. *See* Leigh Adele Aberbach, Casenote, *Recoverability of Government Oversight Costs Under CERCLA Section 107: United States v. Rohm & Haas Co.*, 6 Vill. Envt'l L.J. 123, 129 n.34 (1995).

The Companies submitting this brief, alone, have engaged in more than 170 such cleanups not involving litigation (or covered settlements) under Section 106 or 107, with past and estimated future response costs in excess of $1.7 billion. At least 50 of these cleanups, with past and estimated future response costs of over $750 million, were performed under the RCRA Corrective Action program which, as discussed *infra* at 26, EPA views as providing "equivalent protection" to CERCLA. *See* EPA RCRA-CERCLA Coordination Memorandum at 4. At many of these sites, other parties (including the United States) are partly responsible for the contamination. Under Petitioner's interpretation of Section 113(f)(1), however, the costs—incurred in response to the release of hazardous substances as defined in CERCLA—would not be recoverable in contribution from those other PRPs.

As several courts have recognized, adopting Petitioner's interpretation of Section 113(f)(1), which forecloses PRP volunteers who fund and perform necessary cleanups in full compliance with the NCP[9] from recovering other PRPs' equitable share of the costs, would provide a powerful disincentive to future voluntary remedial action. *See Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) ("We acknowledge . . . that this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available."); *Mardan*, 804 F.2d at 1465 (Reinhardt, J., dissenting) ("Without the ability

[9] Only costs that are necessary and consistent with the NCP are recoverable under CERCLA. *See* 42 U.S.C. § 9607(a)(4)(B).

to require contribution from other responsible parties, the current operator may prefer to wait and let the government do the work."); *E. I. du Pont de Nemours & Co. v. United States*, 297 F. Supp. 2d 740, 754 (D.N.J. 2003) ("*DuPont*") (district court acknowledged that its decision to prohibit a contribution action in the absence of a civil action under Section 106 or 107 "might very well hamper some PRP efforts at removal and remediation of hazardous waste sites").

The United States's more aggressive argument that only a judgment in a "civil action" under Section 106(a) can give rise to a contribution claim (U.S. Br. at 22 n.11) would lead to even more perverse results. According to the United States, a company that receives and complies with a CERCLA Section 106 order and incurs millions of dollars in response costs would have no claim for contribution under CERCLA. Yet, a party seeking to preserve its right of contribution cannot afford to ignore the Section 106 order and invite a Section 106(a) enforcement action. The consequences of refusing to comply are simply too severe: EPA could proceed to conduct the response action on its own, then seek to recover three times the cost of cleanup from the party. *See* 42 U.S.C. § 9607(c)(3). In addition, the non-compliant party could be liable for daily penalties of $32,500 per day over the course of a cleanup that could last for years. *See id.* § 9606(b)(1); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004). And because a party receiving a Section 106 order generally has no right to pre-enforcement review, it would have to sit by helplessly and permit those treble damages and daily penalties to accrue as the cleanup slowly progresses. *See* 42 U.S.C. § 9613(h). Realistically, a PRP that receives a Section 106 order may have no choice but to comply, thereby making a mockery of Congress's intent to provide a right of contribution.

Even if some companies would choose to stand up to EPA, and force the agency to file a lawsuit in order to

ensure their later contribution rights, that is hardly a panacea for those interested in prompt remediation. The government will inevitably lack the resources necessary to initiate Section 106 and 107 actions for every site, and far fewer cleanups will take place. This effect would become more and more pronounced over time, as the size of the Superfund shrinks and less money is set aside for CERCLA enforcement.

EPA officials have publicly acknowledged the significant adverse effect that adoption of Petitioner's position in this case could have on hazardous waste cleanups. Outgoing EPA Region V Superfund Director Bill Muno stated in February 2004 that a restrictive interpretation of Section 113(f)(1) would increase EPA's workload by having companies at sites already under remediation "applying to us for a federal [cleanup] agreement" in order to be able to pursue other parties in contribution. *See "Aviall* May Direct Superfund Enforcement Funds, EPA Official Says," InsideEPA Superfund Report (Feb. 2, 2004). Muno also indicated that a decision reversing the Court of Appeals would require diverting funds from cleanup to enforcement, at a time where Congress has again reduced the budget for the Superfund program in 2004.[10] *See id.* He further acknowledged that EPA had been successful in relying on alternative cleanup programs, saying that EPA was "seeing a lot of cleanup activity still underway outside of the traditional Superfund program." *Id.*

The crabbed view of contribution advanced by Petitioner and the United States would also undermine those cleanups, including the cleanups Congress intended to

[10] A recent analysis by the General Accounting Office ("GAO") found that appropriations for the Superfund program have decreased by $662 million—a 35% decline—since 1998. *See* GAO Letter Report to Senator James Jeffords, GAO-04-475R Superfund Program, Feb. 18, 2004, *available at* http://www.insideepa.com/secure/data_extra/dir_04/epa2004_0352a.pdf (last visited Apr. 4, 2004).

encourage under the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 15 Stat. 2356 (2002) ("Brownfields Act"). CERCLA Section 128, added by the Brownfields Act, provides for grants to states to encourage programs for site assessment and reuse. Where a PRP agrees to conduct a cleanup under such a state program, the United States is *precluded* by Section 128(b)(1) from bringing a civil enforcement action under Section 106 or 107. 42 U.S.C. § 9628(b)(1). If Petitioner's view of the law were adopted, however, that safe harbor would become a trap for the unwary, as any party signing up to conduct a site remediation under a Section 128 program would forfeit its right to obtain contribution under CERCLA for the response costs it incurred.

If the position advanced by Petitioner and the United States were adopted, any parties that might have engaged in cleanups "outside of the traditional Superfund program" would be forced instead to call upon a federal or state agency's limited resources to obtain a "traditional Superfund solution" to preserve their contribution rights—further delaying, rather than expediting, the cleanup of contaminated sites. It is doubtful Congress meant to *impede* the cleanup of contaminated sites in that way. Given Congress's paramount goal to effectuate the prompt cleanup of facilities contaminated with hazardous wastes, it would be perverse to interpret the statute to punish voluntary or cooperative compliance.

Petitioner and the United States protest that their interpretation would not impede such compliance because it would preserve the right of companies to obtain contribution under Section 113(f)(3)(B) so long as they perform the cleanup under the terms of a qualifying settlement with the federal or a state government. But that prospect, for many, would be merely illusory. If every PRP with potential liability for a contaminated site were to engage the federal or a state government in a formal pre-cleanup process to settle their CERCLA liability, it would

quickly overwhelm the limited resources of their enforcement agencies, and dramatically slow the pace of remediation.

The notion that private parties would be permitted to protect their contribution rights by entering into covered settlements is also dubious because Petitioner's and the United States's view of Section 113(f)(1) provides federal and state governments a warped incentive to resist settlement at sites where they are themselves PRPs and therefore potential targets of contribution actions. If the government were immune from having to pay for its contamination at these sites absent a prior civil action under Section 106 or 107, it would have no incentive to enter into a settlement which could allow the settling PRPs to sue the government in contribution. This is not merely a theoretical danger. At some contaminated sites where the Companies are PRPs, the United States is already attempting to condition CERCLA settlements upon PRPs agreeing not to sue the United States in contribution for contamination it caused at or near the sites.[11]

Absent an ability to effect a settlement that includes an allocation of the government's liability for the pollution it caused at the site, PRPs will be able to protect their contribution rights only by foregoing a voluntary cleanup and forcing the United States to bring a civil action under Section 106 or 107. In lieu of a rapid cleanup of a contaminated site, there would be lengthy delays and

[11] The United States has adopted a similar uncompromising negotiating position on matters currently in litigation. For example, General Motors has pending contribution claims against the United States for the government's part in wartime contamination at several General Motors plants. *See Gen. Motors Corp. v. United States*, No. 01-CV-2201 (D.N.J. filed May 7, 2001). After the claims for 14 of the 16 plants were successfully settled through mediation with the government, the United States broke off mediation of the remaining claims in the wake of the district court's decision in *DuPont*.

possibly protracted litigation before any cleanup actually takes place. It is doubtful Congress intended that result.

B. PETITIONER'S CONSTRUCTION OF CERCLA SECTION 113(f)(1) IS INCONSISTENT WITH CONGRESS'S DESIRE TO ENSURE THAT THOSE RESPONSIBLE FOR CONTAMINATION PAY THE COSTS OF REMEDIATION

The Court has recognized that a fundamental purpose of CERCLA is to ensure that "those actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions.'" *United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998) (quoting S. Rep. No. 96-848, at 13 (1980)); *see also Union Gas*, 491 U.S. at 21 ("*[E]veryone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.") (plurality opinion of Brennan, J.) (emphasis in original). Under Petitioner's view, the entire costs would instead by borne by any party that has performed a cleanup in the absence of a Section 106 or 107 action. The inequity of this position is striking, and is perhaps demonstrated most starkly with respect to parties that conduct cleanups under RCRA.

RCRA was enacted in 1977 to reduce the generation of hazardous waste and ensure the proper treatment, handling and disposal of waste that is generated. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). Although RCRA is "not principally designed to effectuate the cleanup of toxic waste sites," *id.*, the practice of the EPA for over 20 years has been to use RCRA for just that purpose. The agency acknowledged this long ago in stating that "[s]ince the first NPL final rule (48 FR 40658, September 8, 1983), the Agency's policy has been to defer placing sites on the NPL that can be addressed by corrective action under Subtitle C of [RCRA]." EPA, Policy Statement, The National Priorities List for Uncontrolled Hazardous Waste

Sites—Criteria for Determining Unwillingness for Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act, 53 Fed. Reg. 30,005, 30,005 (Aug. 8, 1988) ("RCRA Policy Statement").

In 1984, Congress amended RCRA to expand EPA's authority under Subtitle C to require cleanup of contamination under RCRA. The amendments implemented a requirement that facilities which treat, store or dispose of hazardous waste must obtain a RCRA permit from EPA or a delegated state agency. One condition of the RCRA permit is that the facility undertake a long-term corrective action program to address contamination. *See* 42 U.S.C. §§ 6924(u), (v), 6928(h). Based on this enhanced RCRA authority, EPA promulgated a policy that deferred handling RCRA sites under CERCLA unless EPA determined that RCRA corrective action was not likely to succeed or occur promptly. *See* RCRA Policy Statement, 53 Fed. Reg. at 30,006.

EPA has thus come to consider RCRA and CERCLA to provide alternative and essentially equivalent means for achieving cleanups of contaminated properties. *See* EPA RCRA-CERCLA Coordination Memorandum at 2 ("Generally, cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs."). The courts in turn have recognized that costs related to actions that qualify as "removal actions" within the meaning of CERCLA are recoverable under CERCLA, notwithstanding a different statutory authority was invoked to achieve the cleanup. *See, e.g., United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1274-75 & n.15 (3d Cir. 1993).[12]

According to Petitioner's reading of Section 113(f)(1), however, a company that incurs costs for a RCRA cleanup

[12] RCRA preserves the right of parties to seek recovery of its cleanup costs under other federal and state laws. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996); 42 U.S.C. § 6972(f).

would not be able to seek contribution from other parties that contributed to the contamination, even though the company's remediation may have been required by EPA as a condition to continued operation of its facility. According to Petitioner, to recover in contribution against other PRPs, the company would instead have to shut down its facility and invite a CERCLA civil enforcement action. The recent decision of the district court in *DuPont* makes clear this is not an extreme hypothetical, but rather the logical implication of Petitioner's argument. *See DuPont*, 297 F. Supp. 2d at 752 ("The simple fact is DuPont could legally choose not to use the Kentucky site for industrial or commercial purposes. DuPont could sell or gift the land. DuPont could allow the land escheat to the state for failure to pay taxes."). It is inconceivable that Congress intended to condition the sharing of costs among responsible parties on a company's willingness to close its viable business or defy EPA's administrative enforcement orders.

IV. PETITIONER'S INTERPRETATION OF SECTION 113(f)(1) WOULD DEFEAT CONGRESS'S INTENTION TO TREAT THE UNITED STATES, WHEN THE UNITED STATES IS A PRP, THE SAME AS ANY OTHER PRP

Petitioner's (and the United States's) position on Section 113(f)(1) is fundamentally inconsistent with the broad waiver of sovereign immunity embodied in CERCLA. Section 120(a)(1) of CERCLA provides that:

> [e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1).[13]

This "'unequivoca[l] express[ion]' of the Federal Government's waiver of its own sovereign immunity," *Union Gas*, 491 U.S. at 10 (citation omitted) (alteration in original), makes clear that the United States, as a PRP, is to be treated no different from any other PRP.[14] *See* H.R. Rep. No. 99-253 (I), at 95, *reprinted in* 1986 U.S.C.C.A.N. at 2877. Although the legislative history of CERCLA itself contains no reference to Congress's intent in adopting this section, one of CERCLA's sponsors confirmed the intent the Court discerned in *Union Gas*. At a 1984 hearing on possible amendments to CERCLA, Senator Robert Stafford lectured a Department of Defense witness that

> [w]hen those of us on this committee sat here in 1979 and 1980 drafting the Superfund law, we all agreed that the Federal Government was to be treated just like any other responsible party. The obligations of the Federal Government were to be exactly the same as those of a private citizen, no more and no less. We think we made this absolutely clear in some of the law's provisions. ... We included these provisions in the law for several policy reasons. *First, based on our experience in other environmental laws, we believed there was a distinct possibility the Federal Government would seek to treat itself differently from private citizens.* ... I will conclude by saying that these provisions were discussed during markup by this committee, and I don't recall any dissent. Despite these explicit provisions, the law has been implemented in a way that, for practical purposes, exempts the Department of Defense and other Federal facilities from the Superfund requirement. Would you please explain why the committee was possibly wrong in deciding that the Department of Defense should be treated exactly as private parties?

Hearings Before the Committee on Environment and Public Works, United States Senate, May 23, 1984, at 343 (statement of Sen. Stafford) (emphasis added).

The United States's interpretation of Section 113(f)(1) would as a practical matter destroy Congress's vision by cutting off the government's liability for contamination it caused at hundreds of facilities where remediation has been completed or is still ongoing. Congress's primary concern in enacting the waiver of sovereign immunity is no less a concern today, when the government's position on CERCLA contribution would permit it to engage in strategic gaming to avoid paying the costs of remediation for which it is responsible.[15]

Petitioner's and the United States's interpretation of Section 113(f)(1) would create numerous options for strategic gaming by the government to avoid liability for contamination the government itself is responsible for.

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[13] This provision was originally codified in CERCLA at 42 U.S.C. § 9607(g) and was moved without substantive changes to 42 U.S.C. § 9620(a)(1) by the SARA amendments.

[14] Lower courts similarly have interpreted the waiver of sovereign immunity in CERCLA broadly to give effect to Congress's purpose that the parties responsible for contamination—including the United States—bear the costs of the remediation. *See United States v. Shell Oil Co.*, 294 F.3d 1045, 1052-53 (9th Cir. 2002); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 840-41 (3d Cir. 1994) (stating that "if the United States, even as a regulator, operates a hazardous waste facility or arranges for the treatment or disposal of hazardous wastes, it should be held responsible for cleanup costs, just as any private business would be"); *East Bay Mun. Util. Dist. v. United States*, 948 F. Supp. 78, 88 (D.D.C. 1996), *aff'd*, 142 F.3d 479 (D.C. Cir. 1998).

[15] The government's potential liability for remediating contaminated properties is enormous. A report by the GAO indicated that the $307 billion in environmental liabilities which the government listed in its fiscal year 2001 budget did not completely encompass all of the government's potential environmental liabilities. *See* GAO, Long-Term Commitments: Improving the Budgetary Focus on Environmental Liabilities, at 7 (Jan. 2003), *available at* http://www.gao.gov/rew.items/d03219.pdf (last visited Apr. 4, 2004).

First, the government could simply choose to avoid any enforcement at such sites. Second, the EPA could issue a Section 106 order to a PRP, requiring it to undertake a cleanup; if the target party complies, the United States would take the position, as it does before the Court, that that party would have no right of contribution. *See* U.S. Br. at 22 n.11. Third, the government could require RCRA corrective action in lieu of a CERCLA listing and thereby impose the entire cost of response on the current owner or operator of the facility. Fourth, the government could bring an action for injunctive relief under RCRA Section 7003, 42 U.S.C. § 6973, seeking to compel cleanup and impose fines. So long as it avoids a civil action under Section 106 or 107, the United States could rest assured that, unlike other PRPs, it would not have to pay the costs of remediating contamination for which it was responsible.[16]

Interpreting Section 113(f)(1) to permit a contribution action only during or following a civil action under Section 106 or 107 would in these ways permit the United States effectively to render meaningless Congress's broad waiver of sovereign immunity. The various means by which the United States could limit a responsible party's recourse against other polluters would have the pernicious effects of distorting the government's enforcement priorities and allowing the United States to evade liability for its own role in contaminating property. Congress plainly never intended that result.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[16] There is no danger of EPA forcing the government to shoulder its responsibilities, as EPA has long been prohibited from proceeding under CERCLA against other federal agencies without the approval of DOJ. *See* Exec. Order 12,580 § 4(e), 52 Fed. Reg. 2923 (Jan. 23, 1987). In practice, DOJ does not permit EPA to seek cost recovery or issue cleanup orders under CERCLA to other federal agencies.

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